

International Union of Operating Engineers Local 649, AFL-CIO and McDougal Hartmann Co. and Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 627, affiliated with the International Brotherhood of Teamsters, AFL-CIO. Case 33-CD-373

January 31, 1995

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

The charge in this 10(k) proceeding was filed September 21, 1994, by the Employer (McDougal Hartmann Co.), alleging that the Respondent, International Union of Operating Engineers Local 649, AFL-CIO (Operating Engineers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 627, affiliated with the International Brotherhood of Teamsters, AFL-CIO (Teamsters). The hearing was held October 20 and November 3, 1994, before Hearing Officer Joy S. Kessler.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error.¹ On the entire record, the Board makes the following findings.²

I. JURISDICTION

The Employer, a Delaware corporation with a primary place of business at Mossville, Illinois, is engaged in heavy and highway construction within the state of Illinois. During the 12 months preceding the hearing, the Employer purchased and received goods valued in excess of \$50,000 from vendors who received those goods directly from outside the State of Illinois. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Teamsters and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

¹ At the hearing, the hearing officer denied the Teamsters' motion to quash the notice of hearing. Although the motion should have been referred to the Board for decision, no prejudice has resulted from the hearing officer's ruling. Based on our independent review of the record, we agree with the hearing officer, for the reasons set forth below, that the Teamsters' motion should be denied.

² The Employer filed a motion to correct the transcript and the Operating Engineers filed a response. We grant the Employer's motion as modified by the Operating Engineers' response.

II. THE DISPUTE

A. Background and Facts of the Dispute

In mid-August, 1994,³ Illinois Power Company awarded the Employer a project in Havana, Illinois involving cleaning out the bases of two overflow ash ponds, covering the existing ash with soil, and contouring the surface. The work in dispute relates to the operation of vehicles used in moving ash and soil. The Employer decided to use articulated dump trucks to perform the work rather than scrapers because of the wetness and adverse ground conditions at the site. The Employer had never previously used articulated dump trucks.

The Employer assigned the operation of the articulated dump trucks to employees represented by the Operating Engineers. On September 2, the Employer's president, James Volk, telephoned Operating Engineers Business Manager Bill Agee and informed him of the assignment. Agee agreed that Operating Engineers-represented employees would perform the work. Volk confirmed the assignment by letter dated September 2.

Employees represented by Operating Engineers began operating the first articulated dump truck on September 13. A second truck was added on September 15 and a third was added on September 16. On September 16, Teamsters Secretary-Treasurer Gleason telephoned Volk and stated that operation of the articulated trucks was Teamsters' work. Gleason told Volk that three qualified employees represented by the Teamsters would be furnished for the project on September 19. Volk told Gleason that no Teamsters-represented employees were needed because the work had been assigned to employees represented by Operating Engineers. Volk testified that Gleason then stated that if the Teamsters' attorney approved, Teamsters would picket if employees represented by Teamsters were not assigned the work. Gleason denied threatening to picket.

The Teamsters did not picket the jobsite, but on September 16, it filed a grievance against the Employer asserting, inter alia, that the Employer had improperly assigned operation of the articulated dump trucks to employees represented by Operating Engineers rather than employees represented by Teamsters.

On September 20, Volk informed Agee that the Teamsters had filed a grievance. In response, Agee stated that the Operating Engineers would picket if the work were reassigned. On September 21, the Employer filed the instant charge against the Operating Engineers.

³ All dates are in 1994 unless otherwise specified.

B. Work in Dispute

The disputed work involves the operation of articulated dump trucks at the Illinois Power Company project in Havana, Illinois. The project involves cleaning out two ash ponds, transporting the ash to a third pond, and contouring and closing the third pond by putting a 3-foot cover of dirt on it.

C. Contentions of the Parties

The Employer and Operating Engineers contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated because both Teamsters and Operating Engineers have demanded the disputed work and Operating Engineers has threatened to picket if the work is reassigned to employees represented by Teamsters. They assert that no evidence was presented that the threat was not genuine. The Employer and Operating Engineers further contend that there is no agreed-upon method for the voluntary adjustment of this dispute which binds all the parties. The Employer and Operating Engineers also argue that the disputed work should be awarded to employees represented by Operating Engineers based on employer preference, area practice, economy and efficiency of operations, and loss of employment.

The Teamsters contends that no jurisdictional dispute exists and that the notice of hearing should be quashed because there is no reasonable cause to believe Section 8(b)(4)(D) has been violated and there are agreed-upon methods for voluntary adjustment of the dispute. The Teamsters alleges that the Operating Engineers' threat to picket was a sham and that the Operating Engineers and the Employer colluded to create the illusion of a dispute. The Teamsters further contends that the parties are bound to an agreed-upon method of voluntary adjustment of the dispute, because the Unions are bound by procedures established by the parent International Unions to resolve jurisdictional disputes. It also claims that the Unions, as members of the AFL-CIO, are bound under article XX of the AFL-CIO constitution regarding the settlement of internal disputes. In addition, the Teamsters contends that the disputed work should be awarded to employees it represents based on the awards of the International Unions and the AFL-CIO impartial umpire, its collective-bargaining agreement, area and industry practice, and relative skills and safety.

D. Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated, and that the parties have no agreed-upon method for voluntary adjustment of the dispute.

Initially, we find that there are competing claims to the work in dispute. Operating Engineers claimed the work on September 2 when Agee told Volk that Operating Engineers-represented employees would operate the trucks. Teamsters claimed the work on September 16 when Gleason told Volk that operation of the trucks was Teamsters' work.

We also find that reasonable cause exists to believe that a violation of Section 8(b)(4)(D) has occurred based on Operating Engineers' threat to picket if the work were reassigned to employees represented by Teamsters. Contrary to the Teamsters' contention, we cannot find that the threat was not genuine. The statement on its face constitutes a threat to picket and there is no evidence that Agee was not serious in making the threat or had in any way colluded with the Employer in this matter. The existence of a clause in the Operating Engineers' collective-bargaining agreement prohibiting strikes prior to the exhaustion of established dispute resolution mechanisms does not provide a basis for a finding that the threat was a sham. See *Teamsters Local 6 (Anheuser-Busch)*, 270 NLRB 219, 220 (1984).

We also reject the Teamsters' argument that there is an agreed-upon method for voluntary adjustment of the dispute. Contrary to the Teamsters' contention, there is nothing in the collective-bargaining agreements which binds all three parties to the same method for resolving jurisdictional disputes.

The Teamsters relies on the agreement of the General Presidents of the International Union of Operating Engineers and the International Brotherhood of Teamsters that under article VI, paragraph (b) of the 1990 addendum to their 1969 agreement, the operation of articulated dump trucks is the work of the Teamsters. Although the International Unions have established methods of resolving disputes, the Employer is not a party to, and has not agreed to be bound by, those procedures. Although the Employer's contract with the Operating Engineers states that the parties "agree to be bound by the rules, procedures and decisions of the Impartial Jurisdictional Disputes Board for the Building and Construction Industry or its successor," there is no evidence that the agreement between the Internationals is a product of that procedure. Thus, we find that the Employer is not bound to that agreement. The Teamsters asserts that by signing the Articles of Construction Agreement between the Associated General Contractors of Illinois and the Teamsters, the Employer became bound to all provisions in the Teamsters collective-bargaining agreement, including grievance and jurisdictional provisions and the interpretations given to those provisions. Teamsters argues that because the Internationals have "given meaning" to the jurisdictional provisions involved in this case the Employer has agreed to that interpretation. We reject

this argument. The record contains no evidence that the Employer has agreed to be bound by any agreement between the Unions. Because the Employer is not a party to any agreement between the Unions, and is not bound to the dispute resolution procedures set up by the Unions, there is no voluntary mechanism which would preclude the Board from determining the dispute. *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 502 (1994).

Similarly, while the Teamsters submits that procedures under article XX of the AFL-CIO Constitution are an agreed-upon method of resolving the dispute, the Employer did not agree to be bound by an article XX award. Absent the Employer's voluntary assent, no other method exists for the resolution of this dispute. *Electronic & Space Technicians Local 1553 (Hughes Aircraft)*, 313 NLRB 800, 804 (1994).

For these reasons, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination, and we deny Teamsters' motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There is no Board certification or bargaining order determining the collective-bargaining representative of the employees performing the work in dispute. The Employer's collective-bargaining agreement with Operating Engineers grants Operating Engineers jurisdiction over "the operating and maintenance of all hoisting and portable machines and engines used on Open and Heavy Construction work whether operated by Steam, Electricity, Gasoline, Diesel, Compressed Air, or Hydraulic Power." The Employer's collective-bargaining agreement with the Teamsters applies to "all employees transporting materials and/or performing work in classifications covered in Article 10 upon construction sites." Article 10 includes 2-, 3-, or 4-axle trucks hauling 16 tons or more.

Neither contract specifically refers to the operation of articulated dump trucks, and both contracts arguably cover the disputed work. Accordingly, we find that the factors of certification and collective-bargaining agreements do not favor awarding the disputed work to either group of employees.

2. Company preference and practice

Because the Employer has not previously used articulated dump trucks, there is no Employer past practice. However, the Employer prefers assigning the disputed work to the employees represented by the Operating Engineers and has assigned it to them. The Employer has experienced no difficulty as a result of the assignment of the disputed work to employees represented by Operating Engineers and wishes to continue that assignment. Accordingly, we find that this factor favors awarding the disputed work to the employees represented by the Operating Engineers.

3. Area and industry practice

The evidence regarding area and industry practice is inconclusive. Several other employers, Lambrecht Construction and Ironhustlers Excavating (also known as Schielein Construction), and Stark have used employees represented by Operating Engineers to operate articulated dump trucks. However, the Lambrecht assignment was the subject of dispute resolution proceedings between the two unions, leading to an agreement between the Internationals that the work belonged to the Teamsters and resulting in a financial settlement for affected Teamsters-represented employees. The Ironhustlers and the Stark assignments are also the subject of pending proceedings between the Unions.

Teamsters argues that the agreement between the Internationals in the Lambrecht case establishes that industry practice favors awarding the disputed work to employees represented by the Teamsters. Teamsters also relies on Gleason's testimony that he knew of two contractors who had utilized Teamsters-represented employees to operate articulated dump trucks. One of these companies, Freesen, Inc., has employed employees represented by both Teamsters and Operating Engineers in the operation of articulated dump trucks.

We disagree with the assertion of the Employer and the Operating Engineers that the weight of the evidence on this factor favors awarding the work to Operating Engineers-represented employees. Instead, we find that this factor is inconclusive and does not favor awarding the disputed work to either group of employees.

4. Relative skills

No specialized training is required for the operation of an articulated dump truck and both groups of employees possess the skills necessary to perform the dis-

puted work. Accordingly, we find that this factor does not favor awarding the disputed work to either group of employees.

5. Economy and efficiency of operations

Volk testified that it is more economical and efficient to have the disputed work performed by employees represented by Operating Engineers. He asserted that they are more familiar with the type of work done on the site. In addition, the Employer can move Operating Engineers-represented employees to spare equipment in situations in which the articulated dump trucks become inoperative due to mechanical problems. Such reassignment would not be feasible if Teamsters-represented employees were used because the only other Teamsters-operated piece of equipment on the site is the water truck which is used intermittently for dust control. Further, by assigning the work to Operating Engineers-represented employees, the Employer has been able to have the work performed by employees in its existing employee complement. If the Employer had assigned the work to Teamsters-represented employees, it would have had to hire additional employees from the hiring hall.

Teamsters argues that its employees would not sit idly by in the event of an equipment breakdown because they can be sent home after 4 hours. It further contends that it is more economical to use Teamsters-represented employees because the Teamsters wage rate is \$3-per-hour less than that of Operating Engineers. However, the Board does not consider wage differentials as a basis for awarding disputed work. *Longshoremen ILA Local 1242 (Rail Distribution Center)*, 310 NLRB 1 fn. 4 (1993).

On the basis of the foregoing evidence, but without reference to wage rate differentials, we find that this factor favors awarding the disputed work to employees represented by Operating Engineers.

6. Agreements of the Internationals and Impartial Umpire's Award

The Teamsters argues that the Board should assign great weight to the agreement of the Internationals to award operation of the articulated dump trucks to Teamsters-represented employees. Teamsters relies on a 1990 addendum to the International Unions' 1969 jurisdictional agreement and its 1993 application in the *Lambrecht* case involving work similar to that involved in the instant case. Because the Employer was not a party to that agreement, we cannot give dispositive weight to it.

Teamsters also relies on the award of the Impartial Umpire in article XX proceedings under the AFL-CIO

constitution in a case in which Waste Management, Inc. assigned operation of articulated dump trucks to employees represented by Teamsters Local 142 rather than to employees represented by Operating Engineers Local 150. The Impartial Umpire found that Teamsters Local 142 was not in violation of article XX, sections 2 and 3 of the AFL-CIO constitution. That case arose in Indiana and involved two different locals and a different employer than those involved in the instant case. That case also concerned the interpretation of a different collective-bargaining agreement. Because the Employer was not involved in that proceeding and did not agree to be bound by its result, and the award concerned work outside the jurisdiction of the Unions involved in this case, we do not find that award to be dispositive.

We have considered these awards and agreements and find that they tend to favor awarding the work in dispute to Teamsters-represented employees. However, we do not consider them controlling, and we conclude that this factor does not outweigh other factors favoring awarding the disputed work to employees represented by Operating Engineers.⁴

Conclusions

After considering all the relevant factors, we conclude that employees represented by Operating Engineers are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Operating Engineers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees represented by International Union of Operating Engineers Local 649, AFL-CIO are entitled to perform the operation of articulated dump trucks at the Illinois Power Company project in Havana, Illinois.

⁴*Drywall Tapers Local 2006 (Painting and Decorating Contractors)*, 248 NLRB 626 (1980), relied on by Teamsters, is distinguishable. In that case the award by the International was entitled to much greater weight because it involved the specific work in dispute. Here, the award involved a different employer, different unions, and a different jobsite. In any event, there, as here, we found that this factor favored awarding the work to the union that had prevailed before the International. We did not, however, give this factor dispositive weight. The result in the *Drywall Tapers* case differs from this one, because a majority of the relevant factors (including this one) favored the local that was awarded the work by the International.